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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSEL, Superintendent of Schools of Prince George's County,

Petitioners,

v.

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE J. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated,

Respondents,

v.

JESSE ALEXANDER ELLER, MARTHA STREET ELLER, BRENDON EDWARD LYNCH, MARJORIE ELAINE LYNCH, KENNETH PHILLIP WHITTEMORE, BETTE ANN WHITTEMORE, ARTHUR EMANUEL DINERMAN, JANET AVIN DINERMAN, MORRIS EDWARD SAMPSON, THELMA OLINDA SAMPSON, WILLIAM RAYMOND LEER, MARGARET STREET LEER, LEO PAUL CHABOT, WANDA MAXINE CHABOT, JOHN EUGENE SPAULDING and BERNADINE LANE SPAULDING, Intervenors

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Board of Education of Prince George's County, Maryland, et al., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals

for the Fourth Circuit in this case, entered on January 23, 1973.

OPINION BELOW

1. The opinion below, from which this Petition for Writ of Certiorari is sought, is contained on page 25a of the Appendix filed hereafter.

2. The Order of this Honorable Supreme Court of the United States, extending the time for the filing of this Petition for Writ of Certiorari, is contained on page 62a of the Appendix filed hereafter.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 23, 1973. Jurisdiction of this Court is invoked under Article III, Section II of the Constitution of the United States and 28 USC 1254(1).

BACKGROUND OF THE CASE

The Petitioners, Board of Education of Prince George's County, Maryland, et al., operate what is reputed as being the tenth largest public school system in the United States. Admittedly, school districts in Maryland, as in many other states of the United States, were under state legislatively enacted laws that compelled public school attendance on a racially segregated basis. Subsequent to *Brown I* in 1954, the Petitioners, as other school districts in the State of Maryland, commenced with the dismantling of the previously operated dual school system.

This process of dismantling the public school system by Petitioners was one in varying segments, whereby Petitioners at all times endeavored to be in compliance with such Acts of Congress or those judicial interpretations being the progeny of *Brown I* as were from time to time in effect. This process of "dismantling" or

"desegregation" commenced with the school year 1954/55 and practically culminated with the school year 1965/66 when Petitioners commenced the operation of the public school system of Prince George's County with a "neutral assignment" policy approved by the Department of Health, Education and Welfare. As a result of this "neutral assignment" policy, only two secondary schools, one senior high and one junior high school, remained all Black student populated subsequent to the commencement of the 1965/66 school year, which two schools became integrated at the commencement of the 1970/71 school year by virtue of Petitioners changing the school attendance areas prescribed for such two schools. Likewise at the commencement of the 1970/71 school year there remained from 1965 only four all black student populated "one race" elementary schools out of 221 schools then operated by Petitioners, of which four, it should be added, one has since seen a slight enrollment of white students.

Subsequent to the rulings of the United States Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 1971, the Department of Health, Education and Welfare commenced two separate administrative actions against Petitioners in August and September, 1971, respectively, alleging non-compliance with Regulations published by said Department pursuant to the *Civil Rights Act of 1964*, Title 42, U.S.C., 1981, et seq. That the H.E.W. action commenced in September, 1971, was resolved in favor of Petitioners, both on the Hearing Examiner [now Administrative Law Judge] level, as well as upon appeal by the Department, by virtue of an affirmation by the U.S. Commissioner of Education. The action instituted by the Department in August 1971, the same being a proceeding seeking the termination of all federal assistance programs funded to Petitioners, was dismissed by the Department after Petitioners commenced with implementation of the Desegregation Plan ordered

December 29, 1972 by the United States District Court for the District of Maryland.

STATEMENT OF THE CASE

The instant proceeding was commenced by an action filed on March 29, 1972 by a number of parents of Black public school children in Prince George's County, Maryland, seeking injunctive relief against the operation of the Prince George's County, Maryland Public School System on a racially segregated basis. Said case was docketed as *Vaughns* vs. *Board of Education of Prince George's County, Maryland, et al.* and titled C.A. 72-325-K in the United States District Court for the District of Maryland.

As a brief digest of the events that occurred in the above mentioned proceedings, Petitioners give the following synopsis:

During the pendency of the proceedings in the Department of Health, Education and Welfare, *supra*, the Respondents instituted this action in the United States District Court for the District of Maryland, on March 29, 1972.

Respondents' request for temporary injunctive relief was denied, after hearing, on March 29, 1972. On April 17, 1972, Petitioners filed a "Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter," which was denied, without prejudice on May 21, 1972. On May 22, 1972, Petitioners filed a general denial in answer to Respondents' complaint. Respondents filed a Motion for Summary Judgment or, in the alternative, for immediate relief pending trial on June 2, 1972. Petitioners filed their Answer to Respondents' Motion for Summary Judgment, accompanied by affidavits, on June 16, 1972. On July 6, 1972, both parties filed an extensive Joint Stipulation of Facts and 18 exhibits thereto.

On the date that Respondents and Petitioners filed the aforestated Joint Stipulation of Facts, Respondents filed on July 6, 1972 a Supplemental Memorandum of Facts and Law in Support of Respondents' Motion for Summary Judgment and on July 12, 1972, Petitioners filed their Supplemental Memorandum of Facts and Law in Support of Petitioners' Answer to Respondents' Motion for Summary Judgment.

On July 25, 1972, the District Court entered an order granting Respondents' Motion for Summary Judgment insofar as it sought a declaration that the Petitioners had not dismantled their dual school system or converted to unitary operation and holding, *sub curia*, all issues pertaining to the type and nature of relief required. The District Court, in an Opinion filed the same day, concluded, on the basis of the facts contained in the Joint Stipulation of Facts, that "the current lack of desegregation in the schools of Prince George's County . . . stems from a pre-Brown I segregated system which has never been effectively dismantled . . ." stating, however, that

> "Against the agreed factual background in this case, defendants oppose plaintiff's motion for summary judgment, asserting that the undisputed facts constitute 'mere conclusions' and that a factual dispute concerning 'causation' exists. *But that dispute, to the extent it exists herein, is relevant not as to whether relief should be granted but rather as to what type of relief is required.*" (italicized for emphasis)

The District Court ordered the Petitioners to continue to work with Lambda Corp. on desegregation plans which were then in progress, to file a progress report on said plan on August 22, 1972 and set a hearing date on August 25, 1972, to consider the reports due on August 22, and the question of the type and nature of relief required. The Petitioners noted their appeal from the July 25, 1972 Order of the District Court on August 22, 1972.

On August 25, 1972, the hearings scheduled by the District Court commenced and lasted until August 31, 1972. On August 31, 1972, the District Court filed an Order and Opinion, which directed the Petitioners to complete desegregation plans on a schedule which would desegregate only the elementary and the junior high schools by January of 1973 and defer desegregation of the senior high schools until September, 1973 and to present such plans on or before December 4, 1972 for hearing scheduled on December 11, 1972.

On September 1, 1972, Respondents noted an appeal from the August 31, 1972 Order and Opinion. The appeals of the parties were consolidated for hearing and the appeals were heard *en banc* on October 2, 1972, and on October 12, 1972, the Court of Appeals for the Fourth Circuit filed its *per curiam* opinion, 468 F2d, 894.

On December 4, 7, 13 and 26, 1972, hearings were held on alternative plans submitted and dates for implementation. In addition, the Court met with counsel and certain of the Petitioners' staff experts to consider further details of the plans in chambers, on December 7, 11, 13, 18 and 21, 1972. On December 13, 1972, the District Court filed a Memorandum of Facts and Law, unreported and on December 29, 1972, an Order and Opinion approving the desegregation plans and ordering implementation at grades K-11 on January 29, 1972.

Subsequent to the Order and Opinion of December 29, 1972 and upon the filing of an Appeal to the United States Court of Appeals for the Fourth Circuit, the said Court of Appeals issued, on January 23, 1973, its Mandate, affirming the aforestated Order of the United States District Court of December 29, 1972, indicating in said Mandate that said Court "reserves the right to file a written opinion at a later date."

It is from this Mandate of January 23, 1973 that

Petitioners apply for a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioners further call attention to the fact that there was previously filed by Petitioners with the Chief Justice of the United States an Application to Stay the aforestated Mandate of the United States Court of Appeals for the Fourth Circuit, which Application to Stay was denied by the Chief Justice on January 26, 1973, in which denial all Justices except Mr. Justice Brennan, Mr. Justice Blackmun, and Mr. Justice Powell concurred.

Petitioners further call attention to the fact that, pursuant to correspondence between Petitioners' counsel and the Honorable Clement F. Haynsworth, Jr., Chief Judge of the United States Court of Appeals for the Fourth Circuit, there was filed by Petitioners, on April 12, 1973, a Motion to Extend Time for the Filing of a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, which Motion to Extend Time was granted by the Chief Justice on April 13, 1973, extending the time for filing up to and including June 22, 1973.

As of the date of the preparation of this Petition, there has been no written Opinion filed by the United States Court of Appeals for the Fourth Circuit. Petitioners specifically state that, in the event a written Opinion is filed by the United States Court of Appeals for the Fourth Circuit prior to the Supreme Court acting upon this Petition, Petitioners shall endeavor to seek permission to file a Supplemental Petition, containing therein the written opinion of the United States Circuit Court of Appeals for the Fourth Circuit, as well as such commentary thereon as Petitioners may deem suitable and proper.

It is from the Mandate of the United States Court of Appeals for the Fourth Circuit of January 23, 1973 that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit is filed.

REASONS FOR GRANTING THE WRIT

Introduction

This case merits review on certiorari because it involves an important legal question that has been raised within the Federal Court System. Furthermore, the question so raised relates not only to litigation pertaining to actions brought under the Civil Rights Act of 1964 or, for that matter, other similar types of litigation relating to the overall subject of civil rights, but actually pertains to present practices and procedures concerning Summary Judgment irrespective of the underlying legal or factual issues raised in a case, and/or the prayers for relief sought by a plaintiff. It is therefore submitted that this case should be reviewed not only because its holdings may be of great significance in future actions relating to the desegregation of public school systems, but furthermore because the holdings of the courts below may materially affect future Summary Judgment practices and procedures.

I

The Federal District Court and the Court of Appeals Erred in Holding That a United States District Court Can Properly Issue a Partial Summary Judgment Based Solely upon a Joint Stipulation of Facts Filed for the Purpose of Expediting an Evidentiary Hearing, When Such Motion for Summary Judgment Was Opposed by Both Answer of Defendant and Accompanying Affidavits in Support of Such Opposition.

Although there has been total implementation of the Desegregation Plan, as ordered into effect by the United States District Court pursuant to its Order of December 29, 1972, Petitioners, nevertheless, believe that, as a matter of law, they were denied the opportunity for a full Evidentiary Hearing, the purpose of which Hearing would have been to afford Petitioners the opportunity to overcome any presumptions that would, at first glance, presume Petitioners to be operating a school system that

has never effectively dismantled the former statutorily mandated dual system of education.

Petitioners have, since July 25, 1972, consistently contended that even if upon a trial of the merits and issues raised in the original Complaint of Respondents, there would be a finding identical to the one of July 25, 1972, Petitioners, nevertheless, had as much of a constitutional right to first present their case as Respondents allege to have had a right to the ultimate relief granted. This right to first present the case was foreclosed upon and expunged by the Court below as a result of its rendering an Opinion and Order upon statistical collations and summaries entitled "Joint Stipulation of Facts".

Petitioners feel it significant to review the events preceding the July 25, 1972 Opinion and Order as such events appear on the docket of this proceeding in the Court below.

The Order of the Court below of July 25, 1972, not a Final or appealable Order, was predicated upon the Court's finding that there was a constitutional violation in the operation of the public schools of Prince George's County, which finding was based in totality upon a Joint Stipulation of Facts which counsel for both Petitioners and Respondents filed in anticipation of expediting a trial on the allegations. The record clearly shows that after the Respondents filed on June 2, 1972 a Motion of Plaintiffs for Summary Judgment, the Petitioners filed on June 16, 1972 an Answer to Plaintiffs' Motion for Summary Judgment, opposing the granting of same and filing with said Answer two Affidavits in support of Petitioners' opposition to Respondents original Motion for Summary Judgment.

Moreover, pending the District Court's determination of Respondents' Motion for Summary Judgment, *counsel for both parties, in anticipation of a denial of Summary Judgment and in endeavoring to shorten dramatically the*

trial time required on the issues, filed on July 6, 1972 a Joint Stipulation of Facts with eighteen accompanying Exhibits, all of which Facts and Exhibits were, in essence, summarizations of statistics and data previously published by the Petitioners concerning the desegregation of the public schools of Prince George's County.

The District Court docket further shows that subsequent to the date that the Joint Stipulation of Facts was filed, the Petitioners filed on July 6, 1972 a Supplemental Memorandum of Facts and Law in support of their original Answer and Opposition to Plaintiff's Motion for Summary Judgment.

The Opinion and Order of the Court below of July 25, 1972 did not at all address itself to either the Petitioners, or Respondents' filings of Motions for and Motions against Summary Judgment but, instead, was predicated solely upon certain specifics of information collated within said Joint Declaration of Facts.

It is contended that this finding by the Court below of July 25, 1972 is not only contrary to every case that has ever been adjudicated in the filed of school desegregation, but actually is *contrary* to the very principles of legal procedure pronounced by the Chief Justice in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) as the means of ascertaining constitutional compliance.

> "In Green, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important *indicia* of a segregated system. 391 US at 435, 20 L Ed 2d at 722. Independent of student assignment, where it is *possible* to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under

> the Equal Protection Clause is shown." (Italicized for emphasis)

This very pronouncement that a *prima facie* case was sustained was never intented to be so interpreted as to preclude an opposing party from submitting proof, or at least attempting to do so, of a nature sufficient to overcome any presumptions against it by virtue of this *prima facie* evidence. Petitioners further, quoting from *Swann, supra,*

> ". . . in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure school authority's compliance with its constitutional duty *warrants a presumption against schools* that are substantially disproportionate in their racial composition." (Italicized for emphasis)

The entire history of school desegregation cases is one of long and involved hearings in the United States District Courts, wherein both moving and opposing parties tediously review the status and standings of the school district with respect to each and every facet of administration, construction, pupil attendance, employment practices and the like.

The long chain of school desegregation cases resulting in conclusory findings of non-compliance with constitutional requirements were made by District Courts only after all issues were heard and the defendant school districts given the opportunity to overcome such presumptions as may have been made against them by virtue of statistical collations concerning the numbers of "one-race schools". *Brown* v. *Board of Education,* 1954, 347 U.S. 483; *Swann, supra.*

If anything, the Joint Stipulation of Facts denoted the use of a *neutral assignment* policy (*Bivins* v. *Bibb County Board of Education,* M.D. Ga., 1971, 331 F. Supp. 9; *Boyd* v. *Pointe Cupee Parish School Board,* E.D. La., 1971, 332 F. Supp. 994) and called clear attention to the

"black flight" from the neighboring District of Columbia school system lending strong presumptions toward a maximum finding of partial *de jure* and partial *de facto* (*Keyes* v. *School District No. 1*, 10th Cir., 1971, 445 F.2d 990, *cert. granted*, 92 S. Ct. 707).

Moreover, in the dissent by four Justices, including the Chief Justice of the Supreme Court of the United States, in *Wright* v. *Council of City of Emporia*,— U.S.—, 33 L. Ed. 2d 51, 92 S. Ct.—, decided, post *Swann, supra*, on June 22, 1972, this very concept of a *neutral assignment* policy was reaffirmed:

> "If the severance of the two systems were permitted to proceed, the assignment of children to schools would depend solely on their residence. County residents would attend county schools, and city residents would attend city schools. *Assignment to schools would in no sense depend on race. Such a geographic assignment pattern is prima facie consistent with the Equal Protection Clause.* See Spencer v. Kugler, 326 F. Supp. 1235 (NJ 1971), aff'd, 404 US 1027, 30 L Ed 2d 723, 92 S Ct 707 (1972)." (Italicized for emphasis)

Originally, the Court below, in its July 25, 1972 Opinion, acknowledged the possibility of "black flight" and inferentially recognized resulting *neutral assignment* patterns by stating that

> "Against the agreed factual background in this case, defendants oppose plaintiff's motion for summary judgment, asserting that the undisputed facts constitute 'mere conclusions' and that a factual dispute concerning 'causation' exists. *But that dispute, to the extent it exists herein, is relevant not as to whether relief should be granted but rather as to what type of relief is required.*" (Italicized for emphasis) (Page 4, July 25, 1972 Opinion).

Yet, Petitioners submit that the Order of the Court

below of December 29, 1972 not only disregarded the language of its July 25, 1972 Order (supra) but in its total rejection of the alternative plans that were submitted December 4, 1972, the Court below permitted no deviations in the submission of future plans to take into account "what type of relief is required."

Petitioners contend that, absent a trial on the merits of the original allegations of Respondents' Complaint, the issues that Petitioners could have raised were summarily adjudicated without any due process of law accorded said Petitioners. Thus, the Court below, in acting solely upon the barren statistical compilations found in the Joint Stipulation of Facts applied in totality the 'per se" rule of *Green v. New Kent County School Board*, 1968, 391 U.S. 430, and ignored the pronouncements of the Chief Justice in *Swann, supra*.

> ". . . but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, *further intervention by a district court is not necessary.*" (Italicized for emphasis)

Thus, for example, the summary finding by the Court below on July 25, 1972 precluded Petitioners from noting upon the record that there had been an earlier finding by the Court of Appeals of Maryland that the public schools of Prince George's County were *de facto* segregated (this issue was raised initially by Petitioners in an early Motion to Dismiss, filed April 17, 1972, which was denied "without prejudice," but never again permitted to be raised), as well as noted that there had been prior to the inception of the instant litigation a formal finding by the Department of Health, Education and Welfare, to the effect that the school district operated by Petitioners had

succeeded in its affirmative duty to dismantle or desegregate its school system (see *Borders* v. *Board of Education*, 290 A. 2d 510, 265 Md. 488, 1972).

The public school system of Prince George's County, Maryland, as operated by Petitioners, unlike so many other school districts that have defended litigation of this nature before Federal Circuit Courts, has a long history of positive and affirmative action taken by it, from time to time, to totally accomplish whatever desegregation was required by virtue of decisions of the United States Supreme Court. Thus, for example, immediately after *Brown* (*Brown* v. *Board*, 347 U.S. 483), separate "white" and "colored" divisions were abolished and a single unitary concept established leaving to the discretion of each pupil, or his parent, the "freedom of choice" to transfer from that pupil's regularly established school to another. Then, commencing with the school year 1965, "freedom of choice" obviously not accomplishing the goal contemplated by the Petitioners, unitary attendance zones denoting a *neutral assignment policy* were established within the school district, with the ensuing result that each pupil attended the school established for the attendance zone within which such pupil lived.

In spite of this action by Petitioners in 1965, there remained as of the school year 1969, two all-black secondary schools in the county, one senior high and one junior high school. By further action of the Petitioners taken on November 11, 1969, the attendance zones of certain senior and junior high schools were realigned in such a manner as to insure that both of said remaining all-black secondary schools received a substantial number of white pupils.

Due to the proximity of Prince George's County to the District of Columbia, together with the fact that Prince

George's County has historically built the greatest number of low to moderate income homes in the overall Greater Metropolitan Area of Washington, a tremendous number of blacks began to leave the District of Columbia commencing in the early 1960s and continuing to the present time, relocating themselves and their public school age children in an area of Prince George's County within five miles of the boundaries of the District. As a result of this "black flight" a countless number of neighborhoods in Prince George's County changed in varing degree from "white" to "mixed white and black" to predominantly "black". The Joint Stipulation of Facts denoted that there are fortythree schools in Prince George's County today which, although majority "black," were at one time either entirely or majority "white".

In spite of this influx of black population into the county—which influx has actually increased the black enrollment in the public schools of Prince George's County by almost 100% in ratio of black students to white students—there are in Prince George's County, as of this date, no all-black senior high schools, no all-black junior high schools, and only three all-black elementary schools out of one hundred seventy-four elementary schools. Petitioners contend that these three are *one-race schools* of the type referred to in *Swann, supra,* rather than the broad brushstroke interpretation given in the Court below whereby every single school below ten percent Black or above fifty percent Black was construed as being a *"one-race school"*.

For these above stated reasons, Petitioners assert that the issue of *"de facto"* or *"de jure"* segregation must be taken into consideration by any Court before an actual determination of "failure to desegregate" can be held. And, it is submitted that the Joint Stipulation of Facts as

filed at the suggestion of the United States District Judge served solely as the statistical foundation upon which *"de facto"* and *"de jure"* arguments could be made by either the Petitioners or the Respondents in the Court below.

In tracing the concept of Summary Judgment procedure to the conclusions drawn in *Swann*, Peititioners contend that under the former they were entitled to have all *doubts* resolved in its favor and under the latter they were entitled to overcome any *presumptions* made against them. The mere shifting of the "burden of proof" does not give the other party the automatic right to summary jugment.

> "The moving papers and affidavits filed herein indicate a substantial dispute of material fact. Such circumstance forecloses a summary judgment *since all doubts* as to the existence of a genuine issue as to material fact *must be resolved against the party moving for a* summary judgment." (*Toebelman* v. *Missouri-Kansas Pipeline Co.*, 130 F.2d 1016 (3rd Cir., 1942) (Italicized for emphasis)

Pursuant to an action under the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., the Fourth Circuit, Winter, Circuit Judge, in *North Carolina Teachers' Association* v. *Asheboro City Bd. of Ed.*, 393 F.2d 736 (1968) held that,

> "due process was denied when *the defendant, upon whom the burden of proof was placed* after the initial demonstration of a background of discrimination, *failed to show* why, prior to May 14, Holby was not retained. . ." (Italicized for emphasis)

And finally,

> "A 'prima facie case' though stronger than ordinary proof, is only evidence which warrants but does not compel a verdict, and party against whom *prima facie* case is raised by the law is not bound to overcome it and prove the contrary by greater weight of

> evidence, though *if he fails* to introduce proof to overcome it, he assumes risk of adverse verdict." *(Jefferson Standard Life Insurance Co.* v. *Boogher,* 31 S.E. 2d. 771, 772, 224 N.C. 563 (1944)) (Italicized for emphasis)

It is from the nexus of the hereabove quoted portions of decisions of the Courts, that Petitioners' appeal from the Order of the United States District Court of July 25, 1972 and its affirmation by the United States Court of Appeals for the Fourth Circuit, January 23, 1973. The Joint Stipulation of Facts agreed to amongst the attorneys for both Petitioners and Respondents in said United States District Court, served solely to assist the District Judge in having an expedited Hearing absent the introduction of much statistical evidence on such issues as may have remained or upon which agreement could not be reached. However, even in disregarding any additional evidence which Petitioners were proscribed from submitting to the Court at at a trial on the issues remaining, the forty-two page Joint Stipulation of Facts, with additional hundreds of pages of exhibits attached thereto, contained numerous self-contradictory statements, upon no single one of which, absent the consideration of the other, a basic conclusion could have been reached.

The United States District Court Judge in his Opinion and Order of July 25, 1972 culls as highlights from the Joint Stipulation of Facts, only paragraphs 4, 5 and 15, and only some of the germane exhibits containing certain statistical data related to the racial balances of certain schools, at certain times, as well as, the overall county-wide percentages of Black student enrollment. At the same time, other paragraphs or exhibits evidencing a possibility that racial imbalances or "disparties" are not the result of governmental discrimination, are not referred to at all as having been considered in the Opinion

aforestated. Likewise, the Affidavits in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, with exhibits attached to such Opposition, appear also not to have been the subject matter of review at the time the District Judge rendered the July 25, 1972 Order. Thus, Petitioners submit that these statistical collations, at the worst, merely placed the burden of proof upon said Board to overcome the "presumption" (*Swann, supra*) that its public schools were not constitutionally desegregated. These statistics, as in the question of teacher assignments as raised in *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 and 371 (8th Cir., 1970) would merely

> "satisfy any *burden of coming forward* the appellants may have had and would place the burden of proof on the school board to show no racial discrimination . . ." (Italicized for emphasis)

Also see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed. 2d. 158 (1971) where the Supreme Court held that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2000e(15), with respect to employment practices, that under specific circumstances the burden of proof is upon an employer; same concept of burden of proof applied under Sec. 4(a) of the Voting Rights Act of 1965, 42 U.S.C. 1973b(a) in *Gaston County* v. *United States*, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed. 2d. 309 (1969). Furthermore, on June 22, 1972, in *United States* v. *Scotland Neck City Bd. of Ed.*, 33 L.Ed. 2d 75, the Supreme Court re-emphasized the *Swann* (*supra*) concept of placing the burden upon the school district.

The Joint Stipulation of Facts upon which the United States District Court relied, showed, for example, that although in the school year, prior to *Brown I* (*Brown* v. *Board of Education*, 347 U.S. 483 (1954), there were

eighteen predominantly black pupil populated schools, the Board of Education's desegregation plan adopted in 1965 affected ninety-seven schools, containing varying degrees of racial percentages; that in the school year 1971-1972 of two hundred and thirty-two schools operated by said Board of Education 60 are more than 30% black of which less than 20%, or 44, contain pupil populations in excess of 50% black; and further, that of said 60, 43 were at one time more than 50% white.

It is submitted, however, that statistics, such as above, clearly vest in the school district not only the right to overcome any *"presumption" against it (Swann, supra)* but furthermore, such statistics may not even of their own accord create the *"presumption"* initially. Only upon a complete trial on all the issues raised by Petitioners can a Court establish a clear-cut record.

> "The fact that a school board's desegregation plan leaves some disparity in racial balances among various schools in the system does not alone make that plan unacceptable." *(Wright* v. *Council of City of Emporia,*— U.S.—, 33 L.Ed. 2d 51, 92 S.Ct.— (1972)

Thus, Petitioners maintain that, as noted in the Joint Stipulation of Facts, the Desegregation Plan as was originally developed in 1965, and was actually accepted by the United States Department of Health, Education and Welfare, pursuant to its duties under the Civil Rights Act of 1964, and any "disparity" as may have remained thereafter did not lend such irrefutable proof of discrimination as to enable the United States District Court to render, as absolute, a finding on Summary Judgment that

> "the school system of Prince George's County does not, at the present time, meet the standards set forth in *Brown* [supra]. . . and *Swann* [supra]. . ." (page one Order, July 25, 1972, U.S. District Court).

Were the Order of the Court below to be permitted to stand solely upon the Summary Judgment finding, no future school desegregation case would possibly ever again be predicated upon legal principles of discriminatory practices. Instead, school districts would henceforth, by the mere magnitude of their black student population, be found in non-compliance, irrespective of causation!

Moreover, Summary Judgments would be granted in all of such cases the minute a "disparity" in the racial composition of any school would appear. And all of the above would overnight eradicate such long standing principles as,

> "It is now well settled that summary judgment may be entered for either party if the pleadings, depositions, admissions on file and affidavits show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law. Civil Procedure Rule 56 *stated conversely, a substantial dispute as to a material fact forecloses summary judgment.*" (Italicized for emphasis) *Toebelman*, supra.

and

> "A summary judgment may be loosely defined as a judgment decreed by the court in a case pending before it *when as a matter of law* the proceedings show that there is no issue between the parties." (Italicized for emphasis). *Guerrero* v. *American-Hawaiian Steamship Company*, 222 F 2d. 238, 240 (9th Cir., 1955).

Swann, supra, in talking in terms of "presumption[s]", established no *"law"* that any "disparity" *(Wright, supra)* as may exist is, *ipso facto*, the absolute result of a failure "to eliminate from the public schools all vestiges of state-imposed segregation." Furthermore, the *"dispute as to a*

aterial fact" is whether or not as a result of the esegregation Plan as adopted by the Board of Education 1965, the Petitioners did in fact complete or accomplish he affirmative duty to desegregate." (*Swann, supra*).

Furthermore, Petitioners contend that only at an identiary Hearing could Petitioners have submitted idence denoting that the overwhelming number of its so-lled "one race" schools were the result of *de facto* gregation and were in no manner whatsoever related to vernmental policies of discrimination. Petitioners ecifically cite that voluntary action taken by the Board of ucation of Prince George's County on November 11, 69 resulted in the integration of the then remaining all-black secondary schools of Prince George's County virtue of a change in their attendance areas. White rents, protesting this move by Petitioners, instituted gation in the Circuit Court of Prince George's County. d Court affirmed the right of the Board of Education to nge its school attendance areas and the case was ealed to the Maryland Court of Appeals.

Ultimately, the Maryland Court of Appeals affirmed the er Court, upholding in Petitioners the right to take untary action toward achieving racial balances in its blic schools. What is of interest, however, is that the ryland Court of Appeals distinguished *Swann* from the n pending action by stating,

> ". . . whereas by contrast, in the present case *de facto* segregation prevailed. . ." (*Borders* v. *Board of Education*, 290 A.2d 510, 265 Md. 488, 1972)

The above was called to the attention of the District lge by Petitioners in their early Motion to Dismiss as d April 17, 1972. The Court below dismissed said tion "without prejudice" on May 12, 1972, but

Petitioners contend that they were precluded from ever again raising the point of *de facto* as pronounced in *Borders, supra.*

One of the submissions stated in the Joint Stipulation of Facts, and disregarded by the Court below in its July 25, 1972 findings, is that Petitioners adopted *in toto* a Desegregation Plan prepared by the Department of Health, Education and Welfare in 1969.

Petitioners therefore contend that not only is there a viable issue of *de facto* vs. *de jure* in Prince George's County, but further that even if the ultimate facts would justify a *de jure* finding such finding could have only been predicated upon the "tests" made in *Downs* v. *Board of Education,* 336 F.2d 988 (10th C.A. 1964):

1. Did the school board take affirmative action which had the effect of promoting or maintaining segregation?

2. Did, because of population shifts and housing patterns, certain schools become segregated?

In Prince George's County the only public schools that may profess any "racial imbalance" are those located within four miles of the District of Columbia boundary line the overwhelming majority of which were originally opened at a time when the attendance area serving same was white! The extensive Affidavits by the deponents Floyd and Wendorf that accompanied the Answer in Opposition to Plaintiffs' Motion for Summary Judgment as were filed by Petitioners give clear evidence that, at the minimal, there was a *possibility* of *de facto* that was never allowed consideration by the Court below.

> ". . . neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plan is racial imbalance." (*Keyes, supra*).

Of sixty schools Respondents contend to be "racially
ıbalanced" and therefore according to them, *ipso facto*,
jure forty-three were at one time more than 50% white!
ıd of the remaining seventeen, only six were "all black"
which number, three are in municipalities located
thin Prince George's County that lack a single white
sident! Petitioners assert that unlike so many other
ses that have been before the United States Court of
ppeals for the Fourth Circuit where school districts
erated a singularly defined geographic area, the State of
aryland has *county-wide* school systems, in which
unties, municipalities exist. Nowhere, however, in any of
e allegations or references of Respondents do they point
ention to the that all-black municipalities do exist
thin Prince George's County and that the construction of
ublic school to serve such a municipality is not of its own
cord an act engendered by governmental discrimination.

Yet, if Respondents desire to persist in playing the
umbers game" by constantly culling indivudial statistics
m the previously filed Joint Stipulation of Facts,
itioners cite the case of *Bivens* v. *Bibb County Board of*
ucation, 331 F. Supp. 9 (M.D. Ga. 1971), where seven of
y-eight "one race" schools were allowed to remain.
itioners submit that seven out of fifty-eight results in a
greater percentage than seventeen out of the total of
hundred thirty-two schools operated by them.

In *Bivins*, *supra*, the District Court confronted a
merly dual system in which segregation had persisted
er the adoption of the neighborhood system. The Court
d that the state could not be held responsible for
idential patterns since they were the result of non-
vernmental discriminatory practices! Petitioners
tend that there was not *one* single bit of evidence either
ore the Honorable Court of Appeals, or previously

in the Court below, that would even hint of the possibility that anything other than residential patterns were the cause of the "racial imbalance," especially when Prince George's County has had in effect for many years a "Fair Housing Code."

It is submitted that the Court below must first analyze the *de facto* vs. *de jure* question before it can order relief as the relief that would emanate from such an Order would have to take "neighborhood patterns" into consideration rather than automatically and conclusively find "racial ratios" to be synonymous with "unconstitutional."

REMAINING ISSUES

At the time of the filing of the Appeal from the Order of the United States District Court of December 29, 1972, Petitioners presented numerous other questions to the United States Court of Appeals for the Fourth Circuit. However, in view of the affirmation of the Order of the United States District Court by said United States Court of Appeals for the Fourth Circuit, and the implementation of the Court ordered Desegregation Plan, absent the filing of a written Opinion by the United States Court of Appeals for the Fourth Circuit, Petitioners do not renew such other questions for consideration in this Petition. Petitioners, however, do believe that, irrespective of the actual present compliance with the Order of the United States District Court of December 29, 1972, there is very much alive as a legal issue the questions relating to the granting of Summary Judgment under the circumstances presented hereinbefore. Petitioners assert that the granting of partial summary judgment in any legal proceeding where there does appear to be a dispute as to valid and material facts, is contrary to existing judicial procedures.

CONCLUSION

For the reasons set out in this Petition, this Court ıould grant the writ of certiorari, and set the case down ır briefing and argument on the merits.

Respectfully submitted,

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